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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1488

ROGERS C. B. MORTON, Secretary, Department of Interior, *Appellant*

v.

STATE OF NEW MEXICO, NEW MEXICO STATE LIVESTOCK BOARD, LEE S. GARNER, and CLAUDE FOSTER, *Appellees*

BRIEF OF AMERICAN HORSE PROTECTION ASSOCIATION, AMICUS CURIAE, IN SUPPORT OF APPELLANT

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CONSENT

The American Horse Protection Association submits this amicus curiae brief having obtained consent of all the parties to the litigation pursuant to Rule 42(1) of the Supreme Court Rules.

INTEREST OF AMICUS CURIAE

The American Horse Protection Assocation respectfully submits this brief *amicus curiae* in support of the appellant, Rogers C. B. Morton, so that this Court may have the viewpoint of a humane organization knowledgeable in the problems of wild horse and burro protection and preservation, as well as experienced with the evolution of the Wild, Free-

Roaming Horses and Burros Act of 1971 and the enforcement difficulties thereunder.

The American Horse Protection Association (AHPA) is the only national humane organization whose sole purpose is to help insure the welfare and protection of both wild and domestic horses and burros. Founded in 1966, AHPA is a Virginia, non-profit corporation with a membership of over 6,000 persons residing throughout the 50 States. Since its founding, AHPA has been deeply committed to the fight to protect and preserve America's dwindling herds of wild horses and burros. AHPA was involved in the creation of the Pryor Mountain Wild Horse Refuge in 1968, which was the first Federal program undertaken to protect wild horses. In 1970, individual members of AHPA mounted a campaign to inform their individual Congressmen of the harassment and slaughter of wild horses and burros. The Congress responded by enacting the Wild, Free-Roaming Horses and Burros Act of 1971 (the Wild Horse Act). The Act created an advisory board to counsel Federal officials, and the President of AHPA was appointed to serve on it.

Since the passage of the Wild Horse Act, AHPA has been active in monitoring its administration. In April, 1973, AHPA brought the first and only lawsuit seeking to compel enforcement of the Act. The gravamen of that action was the misfeasance and nonfeasance of the Secretaries of Interior and Agriculture and certain of their employees in permitting an illegal roundup and massacre of wild horses in Howe, Idaho. This case did not reach a trial on the merits and is now on appeal in the United States Court of

of Appeals for the District of Columbia Circuit. Furthermore, AHPA has continued to review federal programs concerning wild horses and burros. Its activities include meeting with federal officials, urging stronger enforcement of the Act, and providing on-sight observers for authorized roundups. Finally, members of the AHPA continue to provide information to their Congressmen concerning the progress of protective efforts.

INTRODUCTION AND SUMMARY OF ARGUMENT

The three-judge District Court below determined that Congress was without authority to pass the Wild, Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-40 (Supp. II, 1972). *New Mexico* v. *Morton*, Civil No. 74-127 (D.N.Mex. Feb. 28, 1975). This amicus brief, to the contrary, argues that the Wild Horse Act is one of a series of federal laws validly enacted by virtue of congressional power to legislate with respect to wildlife found on property owned by the United States. It is submitted that in recognition of the broad discretion accorded Congress in the exercise of powers delegated to it by the Territory and Property Clause of the Constitution, and to avoid imperiling an evolving scheme of federal wildlife protection legislation, the decision below must be reversed.

During this century federal legislation has been accepted as appropriate and necessary in some instances to protect and preserve wildlife on federal lands when the States cannot or will not do so effectively. Although the common law traditionally has declared the States to be primarily responsible for the regulation and management of wildlife resources found within

their borders, it also has recognized that important federal interests will supplant State authority. Legislation protecting wildlife on federal lands is one such interest. Congress acts in this regard pursuant to its constitutional duty under the Territory and Property Clause to conserve the national resources it holds and administers in trust for all the people of the United States; these resources include not only the lands owned by the Federal Government but also the wildlife found thereon. Therefore, Congress has authority under the Constitution to legislate to protect wildlife such as the wild horses and burros on federal land. The Wild Horse Act is a proper exercise of that authority, and must be declared constitutional.

ARGUMENT

I.

Wild Horses and Burros Are Part of America's Heritage, and Their Protection by Federal Statute Reflects a Public Policy Favoring National Conservation of Wildlife Resources on Federal Land

The wild horses and burros which roam on the Federal public lands today are a significant part of the heritage of America's Western settlement. America's surviving wild burros are descendants of the abandoned and strayed burros which helped transport our pioneers West, clear land, and till the soil. These burros were also an integral part of the exploration and mining of gold and other valuable minerals which greatly contributed to our Western expansion.

The surviving wild horses are descendants of horses introduced into this country by the early Spanish explorers. From these Spanish mustangs des-

cended the Indian ponies, which, after their abandonment, cross-bred with a mixture of runaway and other abandoned horses and produced the great herds of wild horses that roamed the West early in this century.

In 1900, there were approximately two million wild horses inhabiting the Western plains. By 1969, it was estimated that the number of wild horses had declined to 17,000.[1] This reduction in numbers was the unfortunate result of three factors. First, the westward migration of people and the growth of industry reduced the amount of available grazing land in the Western States. As the amount of grazing land and water decreased, the wild horse became less of a natural resource to the rancher and more of an economic threat. Since the wild horse did not have the economic value of sheep and cattle, the rancher's solution was to kill the horses himself or to allow them to be rounded up by others to be slaughtered for pet food. Second, the wild horses and burros were victimized by certain sportsmen's associations that wanted them removed from secluded game retreats so that they would not compete for the forage and water of game animals. Third, during World War I, the United States rounded up and sold approximately 500,000 horses to our Allies.[2]

Ultimately, Congress, responding to public concern, recognized the gravity of the situation and enacted

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[1] *See Hearings on S. 862, S. 1116, S. 1090 and S. 1119 (Protection of Wild Horses and Burros on Public Lands) Before the Senate Subcomm. on Public Lands of the Comm. of Interior and Insular Affairs,* 92nd Cong., 1st Sess. 70 (1971).

[2] *See generally* H. Ryden, America's Last Wild Horses (1970).

the Wild Free-Roaming Horses and Burros Act of 1971. The Act's preamble declares:

> Congress finds and declares that wild free-roaming horses and burros are living symbols of the historic and pioneer spirit of the West; that they contribute to the diversity of life forms within the Nation and enrich the lives of the American people; and that these horses and burros are fast disappearing from the American scene. It is the policy of Congress that wild free-roaming horses and burros shall be protected from capture, branding, harassment, or death; and to accomplish this they are to be considered in the area where presently found, as an integral part of the natural system of the public lands.[3]

Examined in the perspective of other federal legislation, the Wild, Free-Roaming Horses and Burros Act is one of a series of laws in which the Federal Government insured the protection of public lands and wildlife thereon for the benefit and enjoyment of all United States citizens rather than those who reside in particular States or belong to special interest groups. Beginning with the Taylor Grazing Act of 1934, 43 U.S.C. § 315 *et seq.* (1970), and continuing through the National Environment Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* (1970), and beyond---the evolving policy has been to protect the public's interest in the public's land by mandating the most beneficial uses of federal property. This has been accomplished by allowing recreational uses of public lands and national forests,[4] by setting aside refuges

[3] Pub. L. No. 92-195, § 1, *codified at* 16 U.S.C. § 1331 (Supp. II, 1972).

[4] *See, e.g.*, 16 U.S.C. § 460k (1970).

and sanctuaries for wildlife,[5] and by protecting endangered species and other animals which have been subject to significant decimation.[6] This public policy also includes the protection of animals found on federal lands from cruel and inhumane treatment.[7]

These federal laws acknowledge the necessity for and the benefits derived from the conservation of the public lands and the humane treatment and preservation of the animals found thereon. Furthermore, they recognize that it is the responsibility of the Federal Government to insure that national resources are protected—especially because the States cannot do so uniformly and are unable to withstand the pressures of sporting, commercial or other special interest groups.

The importance of the instant litigation to that federal policy is clear. Once the decision of the New Mexico court was announced, and the federal protection of wild horses seemingly removed, individuals with interests adverse to wild horses reverted to "business as usual" as was practiced prior to the passage of the Wild Horse Act. For example, prior to the entry of the stay of the court's order, numerous applications for wholesale roundups of wild horses and burros by private ranchers were filed with local county boards. Several horses were shot and killed on public lands. A stay of the lower court's order brought a temporary halt to these depredations and saved the lives of hundreds of wild horses. Similarly, a clear pronouncement by this Court affirming the importance

[5] *See, e.g., id.* §§ 671 *et seq.* (1970).

[6] *See, e.g., id.* §§ 1531-43 (Supp. III, 1973).

[7] *See, e.g.*, 18 U.S.C. § 471 (1970); 16 U.S.C. § 742j-1 (Supp. III, 1973).

of the federal policy and declaring the validity of the Wild Horse Act will save the remaining herds of these animals.

AHPA submits that unless this Court reverses the decision of the court below it is not just the wild horses and burros that will face an uncertain and perhaps a dire fate. Past and future legislation enacted pursuant to the Territory and Property Clause establishing national forests and public parks and providing protection for wildlife therein will be susceptible to the same infirmities found in the Wild Horse Act.

Included in this collection of federal statutes are laws to protect wildlife in national parks, in game preserves located on federal land, and in national forests, by prohibiting the hunting, killing, wounding or capturing at any time of any wild bird or animal.[8] Under the rationale of the New Mexico decision, these statutes would be unconstitutional; the Federal Government would not have the inherent power to protect wildlife because these statutes go toward the protection of animals on the land, instead of the land itself. Therefore, only a reversal of the lower court's decision will allow the Congress to maintain the public policy of preserving and protecting the nation's natural resources for the beneficial uses of all of its citizens.

[8] *See, e.g.*, 16 U.S.C. §§ 60, 676, 682, 685, 689b, 692a, 694a, 696 (1970).

II.

The Common Law Doctrine Concerning Ownership of Wild Animals Does Not Prevent Congress From Legislating To Protect Wildlife Found on Property Owned by the United States

Relying on traditional common law doctrine concerning the ownership of wild animals, the three-judge District Court determined that the Wild, Free-Roaming Horses and Burros Act unconstitutionally attempts to make wild horses and burros the property of the Federal Government. The American Horse Protection Association urges that any characterization of federal protection under the Act as advancing a "property" or "ownership" right is inaccurate and misconceives the true nature and purpose of a government's sovereign authority to regulate wildlife. Furthermore, case law development of the common law doctrine indicates that wildlife regulation by the States is not exclusive; federal protective measures, such as the Wild Horse Act, are consistent with common law notions of the control and management of wild animals.

Historically, wild animals (ferae naturae) have been considered to belong in common to the inhabitants of the governmental unit where they were found.[9] They became private property only when reduced to actual possession; in its natural state, wildlife was judged incapable of individual ownership in the ordinary sense of the word.[10] It was recognized, however, that a government could control the taking and subsequent use of wildlife that belonged to its

[9] Geer v. Connecticut, 161 U.S. 519, 522 (1896).

[10] *Id.* at 523, 526-27.

citizens in common.[11] This power, which occasionally has been called a limited form of ownership,[12] was to be exercised in trust for the benefit of all the citizens.[13] The proper role of government regulation, therefore, has been limited to laws necessary and proper to the protection and conservation of its wildlife resources. The government is said to act in a sovereign rather than a proprietary capacity, and may not exercise its powers for the advantage of government as distinct from its citizens, or for the benefit of private individuals as distinguished from the public good.[14]

The principal U.S. case reviewing the common law doctrine is *Geer* v. *Connecticut,* 161 U.S. 519 (1896). In *Geer* the Supreme Court determined that the traditional common law analysis was carried forward in the United States and authorized the States to regulate wildlife in trust for their citizens:

> Undoubtedly, this attribute of government to control the taking of animals ferae naturae, which was thus recognized and enforced by the common law of England, was vested in the colonial governments, where not denied by their charters, or in conflict with grants of the royal prerogative. It is also certain that the power which the colonies thus possessed passed to the states with the separation from the mother country, and remains in them at the present day, *in so far as its exercise*

[11] *Id.* at 522, 523; Lacoste v. Dep't of Conservation, 263 U.S. 545, 549 (1924).

[12] *See* Lacoste v. Dep't of Conservation, 263 U.S. 545, 549 (1924); McCready v. Virginia, 94 U.S. 391, 394-95 (1876).

[13] Geer v. Connecticut, 161 U.S. 519, 529 (1896).

[14] *Id.*

> *may be not incompatible with, or restricted by, the rights conveyed to the federal government by the constitution.*

161 U.S. at 527-28 (emphasis added).

The central question, therefore, is whether the power vested in the States to control and manage wildlife, as announced by *Geer,* prevents Congress from protecting wildlife found on property owned by the United States.

The Supreme Court has recognized that the "ownership" theory of the *Geer* case is essentially a legal shorthand expressing the importance to its people that a State preserve and regulate the exploitation of an important resource.[15] The States' power to protect and preserve their wildlife resources, however, is not absolute; instead, as *Geer* and subsequent cases have recognized, the exercise of state power may be limited by, or incompatible with, powers possessed by the Federal Government.[16] A brief review of these cases indicates that the common law doctrine is not determinative of the Federal Government's power to regulate with respect to wild animals.

First, it is clear that a State's attempt to preserve its wildlife resources may be challenged on constitutional grounds by a defendant charged with violating the state regulatory scheme. Two cases decided since *Geer* have found state wildlife statutes sufficiently discriminatory against out-of-state residents or aliens to

[15] Toomer v. Witsell, 334 U.S. 385, 402 (1948).

[16] Geer v. Connecticut, 161 U.S. 519, 527-28 (1896). *See* Lacoste v. Dep't of Conservation, 263 U.S. 545 (1924); Hunt v. United States, 278 U.S. 96 (1928).

constitute a denial of the guarantees of the Privileges and Immunities Clause of Article IV of the Constitution,[17] or of statutory rights based on the Equal Protection Clause of the Fourteenth Amendment.[18] Despite the strong common law tradition of state "ownership" of wildlife in trust for its citizens, the Supreme Court there refused to create an exception to important federal rights in order to advance a State's interest in regulating wildlife in a manner the State had determined to be in the best interests of its citizens.[19] Also important in these cases was the fact that the State was attempting to regulate in an area outside its exclusive jurisdiction—the three-mile offshore belt of territorial sea.[20]

Other cases, including *Geer,* have sustained state wildlife regulation against challenges that the State law was an unconstitutional infringement of Congress' power to regulate interstate commerce.[21] However, in these cases the Court found that the effect of the State legislation was principally or entirely intrastate and that no burden on interstate commerce was created. Accordingly, since no federal interest was affected, the State's interest in regulating the

[17] Toomer v. Witsell, 334 U.S. 385 (1948).

[18] Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948).

[19] See Toomer v. Witsell, 334 U.S. 385, 402; Takashashi v. Fish and Game Commission, 334 U.S. 410, 421.

[20] *Cf.* United States v. California, 332 U.S. 19 (1947); Alabama v. Texas, 347 U.S. 272 (1954).

[21] McCready v. Virginia, 94 U.S. 391 (1876) (also involving a challenge under the privileges and immunities clause of Article IV of the Constitution); Geer v. Connecticut, 161 U.S. 519 (1896); Lacoste v. Dep't of Conservation, 263 U.S. 545 (1924).

manner in which its wildlife resources were exploited could be given effect.

Second, federal legislation designed to preserve and protect wildlife has been upheld when enacted pursuant to the exercise of a power delegated to the United States by the Constitution. The principal case supporting this proposition is *Missouri* v. *Holland,* 252 U.S. 416 (1920), in which the Supreme Court sustained the validity of federal legislation enacted to enforce the provisions of a treaty between the U.S. and Great Britain protecting migratory wild birds. The Court found that the United States' exercise of its constitutional authority to enter into treaties of this type did not contravene the Tenth Amendment, stating:

> No doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of such birds, but it does not follow that its authority is exclusive of paramount powers. To put the claim of the State upon title is to lean on a slender reed. . . . No doubt the great body of private relationships usually fall within the control of the State, but a treaty may override its power.

252 U.S. at 434.

Finally, the Federal Government may ignore the provisions of state wildlife legislation when acting to preserve or protect property owned by the United States. The Supreme Court has held that congressional power to legislate with respect to federal territories or property and to delegate authority to enforce the legislation is sufficiently broad to override conflicting state game laws or other statutes.[22] Further-

[22] Hunt v. United States, 278 U.S. 96 (1928); see Chalk v. United States, 114 F. 2d 207 (4th Cir. 1940).

more, the exercise of federal power is not limited to situations in which federal property already has been damaged; the United States may act, without regard for contrary state law, to protect its property against potential depredation.[23]

The cases defining the scope of the common law doctrine of regulatory authority over wild animals make it clear that the States do not "own" wildlife in any meaningful sense; they exercise their sovereign power on behalf of their inhabitants to protect and preserve their wildlife resources. The artificial property concepts that sometimes have found expression in early cases have given way in more recent cases to a realistic evaluation of the limits of the States' power to regulate wildlife. Cases invoking the doctrine in its strictest form, such as *Geer* v. *Connecticut,* have done so on facts in which the interest of the Federal Government was found to be minimal or totally absent. However, when state wildlife legislation clearly has infringed upon a constitutional guarantee or has attempted to regulate outside the limits of the States' exclusive jurisdiction—in the three-mile territorial sea, or on property owned by the United States—federal interests were found sufficient to override state interests in preserving or protecting wildlife. Similarly, when the Congress has enacted affirmative protective legislation pursuant to its constitutional powers, otherwise valid state legislation may be denied effect to the extent that it conflicts with federal law. Therefore, the common law doctrine should not be interpreted to foreclose Congress from legislating to protect wildlife found on property

[23] New Mexico State Game Commission v. Udall, 410 F. 2d 1197 (10th Cir. 1969).

owned by the United States, provided there is an adequate constitutional delegation of authority to do so.

Public policy also demands that the Federal Government be permitted to protect and preserve wildlife resources. As we have noted in Part I, since 1896, when *Geer* v. *Connecticut* was decided, the United States has come to realize that federal legislation may be necessary to protect the environment and wildlife when state efforts are ineffective or at cross-purposes, or when reliance on the States is futile. This is the teaching of *Missouri* v. *Holland,*[24] and the large number of federal statutes encouraging wildlife conservation and protecting particular species enacted during this century further attest to the fact that federal regulations concerning wildlife are desirable in certain situations.[25] Undeveloped lands in which wildlife can flourish are fewer today than in the nineteenth century, and wild animals less numerous. In some States particular species have vanished altogether. The citizens of the United States now realize that wildlife protection and preservation is a national as well as a State problem. For that reason, federal efforts on behalf of wild animals should not be impeded by a doctrine whose roots are in an era when ecological concerns were unknown.

[24] *See* 252 U.S. at 435.

[25] *See, e.g.,* the Wild Life Conservation Act, 16 U.S.C. §§ 661-66c (1970); the American Eagle Protection Act, 16 U.S.C. §§ 668-68d (1970); the National Bison Range Act, 16 U.S.C. § 671 (1970); 16 U.S.C. §§ 673-73c (1970), creating the Wyoming Elk Reserve; the Fish and Game Sanctuary Act, 16 U.S.C. §§ 694-94b (1970); Migratory Bird Conservation Act, 16 U.S.C. § 715 *et seq.* (1970; and the Black Bass Act, 16 U.S.C. §§ 851-56 (1970). *See also* 16 U.S.C. § 1, which authorizes the National Parks Service to promote and regulate the federal parklands to conserve the wildlife found therein.

The Wild, Free-Roaming Horses and Burros Act is one example of desirable and appropriate federal protective legislation. The Congress was responding to a demonstrable need for federal protection of a national resource, in a manner consistent with the purposes for which the common law doctrine of governmental wildlife regulation was formulated. To characterize this as asserting a property interest in animals "owned" by the States is misleading. Congress acted pursuant to its constitutional power to legislate with respect to federal lands and wildlife therein held in trust for the people of the United States, not out of any ownership right in the animals. Therefore, the Wild Horse Act supersedes conflicting state regulation of wildlife.

III.

Congress, in the Exercise of Its Constitutional Power To Make Rules and Regulations Respecting Property Belonging to the United States, May Also Enact Legislation Protecting Wildlife Found on Federal Lands

The District Court found, as a second ground for its holding, that Congress was without constitutional power to legislate to protect wild animals. However, the Territory and Property Clause of the United States Constitution[26] endows Congress with sufficient power to enact laws protecting wildlife found on property owned by the United States.

Congress's authority to regulate public lands entrusted to it traditionally has been recognized to be

[26] U.S. Const. art. IV, § 3.

"complete" and "without limitation".[27] Among other powers, Congress may control the occupancy and use of the public domain, protect it from trespass and injury, and prescribe the conditions upon which others may obtain rights in it.[28] This authority has been described as analogous to the police power possessed by the States, and may be exercised according to the exigencies of the particular case.[29] The Supreme Court's uniformly liberal construction of the Territory and Property Clause indicates that Congress has exceedingly broad discretion to deal with matters concerning lands belonging to the United States. In fact, several cases have stated that the administration of entrusted public lands is solely a matter for Congress, not the courts, to determine.[30] Legislation protecting wildlife found on federal property, therefore, is entirely consistent with Congress's extensive authority under the Territory and Property Clause.

Although congressional authority to legislate to protect wildlife appears clear, this Court has never specifically decided the issue. The majority of cases decided under the Territory and Property Clause have been concerned primarily with Congress's power to dispose of the public domain or to protect the land itself from trespass, detrimental use, or some other

[27] United States v. San Francisco, 310 U.S. 16, 29-30 (1940). *See* Utah Power & Light Co. v. United States, 243 U.S. 389, 404 (1917); Hunt v. United States, 278 U.S. 96, 100 (1928).

[28] Utah Power & Light Co. v. United States, 243 U.S. 389, 405 (1917); United States v. San Francisco, 310 U.S. 16, 29-30 (1940).

[29] Camfield v. United States, 167 U.S. 518, 525 (1897).

[30] Light v. United States, 220 U.S. 523, 537 (1911); United States v. San Francisco, 310 U.S. 16, 29 (1940).

danger.[31] The District Court interpreted these decisions to limit the exercise of congressional authority to legislation designed to protect the public lands; because it failed to find a similar purpose for the Wild Horse Act, the court below decided that the Act was unconstitutional. However, the language of the Territory and Property Clause does not compel such a restrictive reading. Rules and regulations "respecting" property belonging to the United States need not be confined necessarily to those which protect only federal land from damage of some kind. Congress could rationally conclude that wild animals on that land were in need of federal protection. If it did so, its powers under the Constitution are sufficient to support such legislation.[32]

At least one judicial decision lends support to this proposition. In *New Mexico State Game Commission* v. *Udall,* 410 F.2d 1197 (1969), the Court of Appeals for the Tenth Circuit held that the statutory authority vested in the Secretary of the Interior to promote and regulate the national parks to "conserve the scenery *and wildlife therein*" was broad enough to permit him to manage wild deer herds and to ignore otherwise valid state game laws.[33] This is but a short

[31] *See, e.g.,* United States v. San Francisco, 310 U.S. 16 (1940) (power to set restrictions on disposal of the public domain); Utah Power & Light Co. v. United States, 243 U.S. 389 (1917) (power to enjoin occupancy and use of federal lands without permission or license); Light v. United States, 220 U.S. 523 (1911) (power to enjoin trespass); F.P.C. v. Idaho Power Co., 344 U.S. 17 (1952) (power to condition use of federal land on restrictions designed to protect and conserve resources).

[32] *Cf.* F.P.C. v. Idaho Power Co., 344 U.S. 17, 23 (1952).

[33] 410 F. 2d at 1200 (emphasis added).

step from holding that affirmative federal statutes protecting wildlife found on federal land are valid exercises of Congress's power. Other cases discussing the Federal Government's power to regulate concerning wild animals despite conflicting state legislation are not to the contrary. These involved existing serious damage to federal property which required that U.S. officials act to protect public land. While the holdings of these cases were expressed in terms concerning the land itself, they clearly did not make the necessity of protecting the land a condition precedent to federal legislation.[34]

Finally, an exercise of congressional authority to regulate wildlife, even if in conflict with otherwise valid state legislation, is not an unconstitutional infringement of rights reserved to the States by the Tenth Amendment. As we have shown in Part II, the States' power to regulate with respect to wildlife is not absolute, and may be overridden by the proper exercise of a power delegated to the United States. This is simply one instance exemplifying the more general proposition that whenever the Federal Government acts within a delegated power, it may supersede countervailing state interests, whether they be characterized as governmental or proprietary.[35] With respect to lands belonging to the United States, the Supreme Court has recognized that even though for some purposes a State has jurisdiction over them, its jurisdiction does not extend in any manner that is inconsistent with the full power of Congress to legis-

[34] *See* Hunt v. United States, 278 U.S. 96 (1928); Chalk v. United States, 114 F.2d 207 (4th Cir. 1940).

[35] Maryland v. Wirtz, 392 U.S. 183, 195 (1968).

late under the Territory and Property Clause.[36] Therefore, to the extent that power to regulate wildlife found on public lands is conferred by the Constitution, "it is manifest that the Tenth Amendment is not applicable."[37]

The public policy mandating federal protection of wildlife likewise requires that congressional legislation supersede state law. If Congress is to protect and administer effectively its public trust over federal lands and the wildlife therein, it must do so uniformly and in a manner that enables animals found on federal lands in only a few States to be protected for the enjoyment of people in the rest of the Nation. If federal legislation were to be subject to the conflicting provisions of a variety of state laws, Congress's constitutional powers would be nullified. As the Supreme Court has stated:

> We do not think that the admission of a Territory as a State deprives [Congress] of the power of legislating for the protection of the public lands, though it may involve the exercise of what is ordinarily known as the police power, so long as such power is directed solely to its own protection. A different rule would place the public domain of the United States completely at the mercy of state legislation.

Camfield v. *United States,* 167 U.S. 518, 526 (1897).

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[36] Utah Power & Light Co. v. United States, 243 U.S. 389, 404 (1917).

[37] Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 330 (1936).

IV.

The Wild Free-Roaming Horses and Burros Act Is a Proper Exercise of Congressional Authority Under the Territory and Property Clause

The language and legislative history of the Wild Free-Roaming Horses and Burros Act clearly indicate that Congress intended to base the Act upon its authority under the Territory and Property Clause. The Act states that to accomplish the protection of wild horses and burros they are to be considered as an integral part of the natural system of the public lands on which they are found;[38] it authorizes the Secretaries of Agriculture and Interior to protect and manage the animals as components of the public lands.[39] Reports explaining the Act issued by the Senate Committee on the Interior and Insular Affairs and the House-Senate Conference Committee employ similar language.[40]

The individual provisions of the Act all are within the scope of congressional authority under the Territory and Property Clause. The Act does not declare wild horses and burros, as defined, to be owned by the United States; instead, in a manner analogous to the exercise of State authority under the common law, the Act asserts the United States' sovereign right to protect and preserve a national wildlife resource. The definition of the animals brought within the jurisdic-

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[38] Pub. L. No. 92-195, § 1, *codified at* 16 U.S.C. § 1331 (Supp. II, 1972).

[39] *Id.* § 3(a), *codified at* 16 U.S.C. § 1333(a).

[40] *See* S. Rep. No. 242, 92d Cong., 1st Sess. 3 (1971); H.R. Rep. No. 681, 92d Cong., 1st Sess. 5 (1971).

tion of the Secretaries of Agriculture and Interior is limited to those on the public lands of the United States, thereby restricting the exercise of federal power to the confines of constitutional authority.[41] The various management powers delegated are to take place on public lands, and are intended to protect or preserve the lands themselves or the wild horses and burros found on them.[42]

To the extent that the Act authorizes federal officials to conduct management functions outside the limits of federal property, it is clearly supported by case law interpretation of the Territory and Property Clause. The Supreme Court has held that, in the exercise of its powers to protect and control federal property, Congress may regulate or forbid certain conduct on private property adjacent to public lands, and may authorize entry onto private property to abate a nuisance or remove a threat.[43] As well, Congress may criminally punish conduct that is inconsistent with the proper protection of federal land.[44] In the exercise of its power to forbid trespass, Congress may forbid entry onto federal property for illegal purposes.[45] The scope of congressional authority under the Territory and Property Clause, therefore, is comprehensive enough to and does encompass

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[41] *See* Pub. L. No. 92-195, § 2(b), *codified at* 16 U.S.C. § 1332(b).

[42] *Id.* § 3, *codified at* 16 U.S.C. § 1333.

[43] United States v. Alford, 274 U.S. 264 (1927); Camfield v. United States, 167 U.S. 518 (1897).

[44] McKelvey v. United States, 260 U.S. 353 (1922).

[45] *Id. Cf.* Light v. United States, 220 U.S. 523 (1911); Utah Power & Light Co. v. United States. 243 U.S. 389 (1917).

the provisions of the Wild, Free-Roaming Horses and Burros Act.

CONCLUSION

For the above-stated reasons, this Court should find the Wild, Free-Roaming Horses and Burros Act to be a valid exercise of congressional authority and should reverse the decision of the New Mexico District Court.

Respectfully submitted,

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